



IN THE SUPREME COURT OF GIBRALTAR

Neutral Citation Number GSC/2024/034

2024/ORD/088

BETWEEN:

AA

Claimant

-and-

(1) HIGHVERN TRUSTEES GUERNSEY LIMITED

(2) LIVINGSTONE TRUSTEES LIMITED

(3) XX

(4) YY

Defendants

Mr Keith Azopardi KC with Ms Emma Dudley (instructed by TSN) for the Claimant.

Judgment date: 26 September 2024

JUDGMENT

HAPPOLD J:

Introduction

1. This is an application made *ex parte* with notice in a Part 8 claim concerning the proper construction of a trust. The Claimant seeks the Court's permission to serve the Claim Form on the Defendants in Guernsey and in England. The

Claimant's primary position, however, is that the Court's permission is not required for him to serve the Defendants out of the jurisdiction. It is only if he is wrong on this does he say that permission should be granted.

2. Whether or not the Court's permission is required to serve the Defendants out of the jurisdiction is unclear because, post-Brexit, the Judgments Regulation (Regulation (EU) No. 1215/2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (recast)) has been retained in Gibraltar, but the Civil Procedure Rules, applicable to original civil proceedings in this Court, no longer provide for service out of the jurisdiction without permission in cases covered by the Judgments Regulation, because the Regulation has been revoked for England and Wales.
3. Between the making of the application and its hearing, all four Defendants have agreed to accept service of the Claim Form. However, they have not (with the exception of the 3rd Defendant, who has done so orally but not confirmed in writing) stated that they accept the jurisdiction of this Court to decide the claim. In addition, as the issue is of some general interest, I thought it appropriate to give a full judgment.

The Judgments Regulation and the Civil Procedure Rules

4. The extent to which EU law continues to apply in Gibraltar following to the United Kingdom's departure from the European Union is set out in the European Union (Withdrawal) Act 2019, s. 6(1) of which provides that: "*[d]irect EU legislation, so far as operative immediately before IP [implementation period] completion day, forms part of domestic law on and after IP completion day.*" The implementation period was the period in the UK–EU Withdrawal Agreement when the UK was no longer an EU Member State but continued to be subject to EU rules and remained a member of the single market and customs union. The UK left the EU on midnight of 31 January 2020. IP completion day was midnight on 31 December 2021. As the Judgments Regulation is "*direct EU legislation*" as defined in s. 6(2) of the 2019 Act, it continues to form part of Gibraltar law. The Civil Jurisdiction and Judgments

Act 1993 continues to refer to Regulation (EU) No. 1215/2012 (see, in particular, ss. 2(1), 38 and 39, and Schedule 10).

5. The United Kingdom, however, did not retain the Judgments Regulation as part of the law of England and Wales after IP completion day (see r. 89 of the Civil Jurisdiction and Judgments (Amendment) (EU Exit) Regulations 2019 ('the 2019 Regulations') revoking Regulation (EU) No. 2115/2012). This led to various consequential amendments to the Civil Procedure Rules by the Civil Procedure Rules 1998 (Amendment) (EU Exit) Rules 2019 ('the 2019 Rules').
6. CPR 6.33 covers "*Service of the claim form where the permission of the court is not required – out of the United Kingdom*". Prior to their amendment by the 2019 Rules, CPR 6.33(2) and (2A) provided that:

"(2) The claimant may serve the claim form on a defendant out of the United Kingdom where each claim made against the defendant to be served and included in the claim form is a claim which the court has power to determine under the Judgments Regulation and –

(a) Subject to paragraph 2A no proceedings between the parties concerning the same claim are pending in the courts of any other part of the United Kingdom or any other Member States; and

(b)(i) the defendant is domiciled in the United Kingdom or in any other Member State;

(ii) the defendant is not a consumer, but is a party to a consumer contract within article 17 of the Judgments Regulation;

(iii) the defendant is an employer and a party to a contract of employment within article 20 of the Judgments Regulation; or

(iv) the proceedings are within article 24 of the Judgments Regulation; or

(v) the defendant is a party to an agreement conferring jurisdiction within article 25 of the Judgments Regulation.

(2A) Paragraph (2)(a) does not apply if the jurisdiction conferred by the agreement referred to in paragraph (2)(b)(v) is exclusive."

7. R. 4(16) of the 2019 Rules removed all references to the Judgments Convention from CPR 6.33(2), replacing them with references to ss 15A-15D of the UK Civil Jurisdiction and Judgments Act 1982, provisions inserted into that Act by Part 2 of the 2019 Regulations; while CPR 6.33(2A) was simply omitted. The UK Civil Jurisdiction and Judgments Act does not, of course, apply in Gibraltar.
8. R. 6(1) of the Supreme Court Rules 2000 provides that:

“Where no other provision is made by these rules or by any Act, rule or regulation in force in Gibraltar, and subject to the express provisions of these rules, the rules of court that apply for the time being in England in the High Court shall apply to all original civil proceedings in the court.”

By virtue of this provision the Civil Procedure Rules apply to original civil proceedings in this Court. At present, however, as described above, CPR 6.33(2) presently provides for service out of the jurisdiction where the permission of the court is not required pursuant to an enactment that does not apply in Gibraltar (the UK Jurisdiction and Judgments Act) but not pursuant to one that does (the Judgments Regulation). This is plainly unsatisfactory.

9. R. 6(3) of the Supreme Court Rules provides, however, that: “[t]he rules applied by sub-rule (1) shall apply with necessary changes and so far only as the circumstances of Gibraltar may permit”. In my view, the circumstances of Gibraltar (that is, its retention of the Judgments Regulation) do not permit the application of the current version of CPR 6.33(2); and given those circumstances it is necessary to continue to apply the previous version of the provision together with CPR 6.33(2A) (with which it is required to be read), as last set out in the 2020 edition of *The White Book* and reproduced in paragraph 6 above.
10. I am confirmed in my conclusion by the judgment of Yeats J in *Edgar v Aitchison Associates Ltd.* 2023/GSC/013. In that case, the claimant sought to enforce a judgment of the High Court of England and Wales relying on a certificate issued under s. 12 of the UK Civil Jurisdiction and Judgments Act because, following the United Kingdom’s withdrawal from the EU and the

ending of the implementation period, he could no longer obtain a certificate under Article 53 of the Judgments Regulation. (It will be recalled that under s. 39 of the Civil Jurisdiction and Judgments Act 1993, Gibraltar and the United Kingdom are treated as separate States for the purposes of the Judgments Regulation, and that Article 42 of the Regulation requires a person seeking to enforce a judgment given in one Member State in another to provide an Article 53 certificate.)

11. Comparing the two certificates, Yeats J saw no material differences between them. The learned judge consequently concluded (at [15]) that:

“It is clear that refusing to accept the section 12 certificate would be putting form over substance... The Regulation has been retained as part of the law of Gibraltar and the legislature has mandated that it apply as between the United Kingdom and Gibraltar. The only way this can happen is if the section 12 certificate is accepted in place of an article 53 certificate. In my judgement, this is necessary and just.”

Albeit not applying r. 6(3) of the Supreme Court Rules, Yeats J applied substantially the same test in circumstances engendered by the same developments, coming to a decision privileging substance over form. My conclusion, I consider, does likewise.

12. Mr Azopardi also suggested another route to the same result, utilising CPR 6.33(3), which provides that:

“The claimant may serve the claim form on a defendant out of the United Kingdom where each claim made against the defendant to be served and includes in the claim form is a claim which the court has power to determine other than under the 2005 Hague Convention, notwithstanding that –

- (a) The person against whom the claim form is made is not within the jurisdiction; or*
- (b) The facts giving rise to the claim did not occur within the jurisdiction.*

In circumstances where the Court has power to determine a claim by virtue of a provision of the Judgments Regulation, Mr Azopardi argued, CPR 6.33(3) would be engaged.

13. I accept that CPR 6.33(3) can be construed in this manner, but I am unconvinced that it is the appropriate route to take for two reasons. First, as Mr Azopardi agreed, continued utilisation of the previous version of CPR 6.33(2) would allow the development of a distinct Gibraltarian jurisprudence on the application of the Judgments Regulation. Second, I am conscious that, pre-Brexit, CPR 6.33(2) was the route by which the Judgments Convention was applied. CPR 6.33(3) only applied to claims which the court had power to determine “*other than under the 1982 Act, the Lugano Convention, the 2005 Hague Convention, or the Judgments Regulation*”. Plainly, amendment of the provision (also by r. 4 of the 2019 Rules) was not intended to permit CPR 6.33(3) to be used to apply the Judgments Regulation, because the Regulation had been revoked for England and Wales. In Gibraltar the Regulation has been retained and the wording of the amended CPR 6.33(3) seems wide enough to cover claims which the court has power to determine under the Regulation; but such an interpretation does seem somewhat at variance with the legislative purpose of the 2019 Rules, and the use of CPR 6.33(3) in this manner a rather roundabout way of getting to the destination sought. Given my conclusion on CPR 6.33(2), however, I do not think that I need to come to a definitive conclusion on this point.

Whether permission of the Court is required in this case

14. I turn now to the application of the Judgments Convention in this case. Under the pre-IP completion day version of CPR 6.33(2), which, as determined above, continues to apply in Gibraltar, a claimant may serve a Claim Form on a defendant out of Gibraltar where each claim made against the defendant to be served and included in the claim form is a claim which the court has power to determine under the Judgments Regulation.

15. The Claimant relies on CPR 6.33(2)(b)(v), that is, that each “*defendant is a party to an agreement conferring jurisdiction within article 25 of the Judgments Regulation*”; and on Article 25(3) of the Regulation, which provides that:

“The court or courts of a Member State on which a trust instrument has conferred jurisdiction shall have exclusive jurisdiction in any proceedings brought against a settlor, trustee or beneficiary, if relations between those persons or their rights or obligations under the trust are involved.”

16. The Claimant’s claim is brought to resolve an issue of the proper construction of a trust. The Claimant seeks declarations that the 3rd Defendant did not validly retire as the Protector of the Trust in September 2009, and that the Claimant was validly appointed as Protector in place of the 3rd Defendant in January 2024.
17. I have had sight of a copy of the Trust Deed. The trust was created on 5 March 2001. The original trustee was a Gibraltar-registered company and the original trust fund comprised of assets issued by another Gibraltar-registered company to the Settlers. The Trust Deed makes various references to Gibraltar legislation and Clause 16 (‘Proper law forum and place of administration’) states that:

- (a) *This settlement is established under the law of Gibraltar which shall be the proper law of this Settlement and the rights of all parties and the construction and effect of every provision hereof shall be determined and regulated according to the laws of Gibraltar.*
- (b) *The management and administration of this Settlement shall be carried on by the Trustees in Gibraltar and the courts of Gibraltar shall (without prejudice to sub-clause (a) of this Clause) be the primary forum for proceedings relating to the Settlement.*

Clause 16 is subordinate to Clause 17 of the Trust Deed, which permits the transfer of the administration of the trust to another jurisdiction. However, although an attempt was made to do this in 2023, it appears to be agreed that it was ineffective.

18. The Claimant is a beneficiary of the Trust, as is the 4th Defendant, who is his sister. Following the resignation of the original Trustee in 2015, it was replaced by the 1st Defendant. The 3rd Defendant is the original Protector named in the

Trust Deed. In 2009, the 3rd Defendant purported to retire as Protector and the Settlers of the Trust purported to appoint the Claimant in his place. In 2023, the Claimant, acting as Protector, purported to remove the 1st Defendant as trustee in favour of the 2nd Defendant. (It was also at this time that an attempt was made to change the proper law of the trust to Guernsey law and to give the courts of Guernsey jurisdiction over proceedings relating to the trust.) Subsequently, however, it was argued that the 3rd Defendant had not validly retired as Protector, and/or the Claimant had not been validly appointed in his place because the retirement and appointment had not been made by deed, as required by Clause 11 of the Trust Deed. As a result, on 4 January 2024 the Claimant and the 3rd Defendant (both Settlers having since died) executed a deed formalising the 3rd Defendant's retirement and the Claimant's appointment as Protector as from that date. On 1 March 2024, the Claimant executed a deed to remove the 1st Defendant as trustee and appoint the 2nd Defendant in its place. There are, however, different opinions as to the validity of both 2024 Deeds.

19. In consequence, the identities of both the Protector and the Trustee of the Trust are presently unclear. Article 25(3) of the Judgments Regulation refers to "*proceedings brought against a settlor, trustee or beneficiary*" but I consider that it would be wrong to read it as only including situations where every party agrees that all parties fall within one of those categories, excluding situations where the identity of a party or parties as such is in dispute. The point was raised in *Line Trust Corporation Ltd. v W and others* [2017] Gib LR 310 at [36] but Dudley CJ took the view (at [38]) that: "*a beneficiary is to be given a purposive interpretation to include possible or potential beneficiaries caught within any such internal dispute.*" This seems to me to be the situation here regarding the identities of the Protector and the Trustee of the Trust. I also consider that although protectors are not specifically named in Article 25(3), they fall within its ambit and for its purposes can be assimilated to trustees as persons concerned with the administration of the trust.
20. The 1st and 2nd Defendants are Guernsey registered companies, and the 3rd Defendant a Guernsey resident. Both the Claimant and the 4th Defendant are resident in England and Wales. I note here that nothing in Article 25(3) of the

Judgments Regulation requires that parties be resident in a Member State and that *Dicey and Morris* states that Article 25 of the Judgments Regulation “applies regardless of the domicile of the parties” (*Dicey and Morris*, 16th ed., 1st Supplement, at 11R-001).

21. On the basis of the information before me, I am of the opinion that that Article 25(3) of the Judgments Regulation grants this Court exclusive jurisdiction over the claim and that, therefore, the Claimant does not need permission of the Court to serve the Defendants out of the jurisdiction. Article 16 of the Trust Deed gives the courts of Gibraltar jurisdiction over disputes relating to the trust. The parties are (or are argued to be) the trustees, beneficiaries or protectors of the trust. And the dispute relates to the administration of the trust, and the relations between the parties and their rights and obligations under the trust.

The situation if the Court’s permission were required

22. Even if I am wrong and the Claimant does require the Court’s permission to serve the Defendants out of the jurisdiction, the Claimant has satisfied me that permission should be granted under CPR 6.36.
23. The test for whether permission should be granted is set out in *Altimo Holdings and Investment Ltd v Kyrgyz Mobil Tel Ltd* [2011] UKPC 7 at [71]. The claimant must satisfy the Court: (i) that there is a serious issue to be tried on the merits; (ii) that there is a good arguable case that the claim falls within one or more classes of case in which permission to serve out may be given; and (iii) that Gibraltar is clearly or distinctly the most appropriate forum for the trial of the dispute, and that in all the circumstances the court ought to exercise its discretion to permit service out.
24. In my view there are serious issues to be tried on the merits. According to the Claimant’s witness statement in support of the application (paras 70-76), he and his sister, the 4th Defendant, disagree on whether the 3rd Defendant’s retirement as Protector in 2009 was valid (the Claimant says no, the 4th Defendant apparently says yes), and whether the Claimant was validly appointed as

Protector in 2024 (the Claimant says yes, the 4th Defendant says no). In addition, the 1st and 2nd Defendants, having both taken legal advice, also disagree on the legal effects of the 2024 Deeds (see the letter dated 14 June 2024 from the 1st Defendant to the Claimant). Although the 1st Defendant is willing to step down as Trustee, it does not think it has yet been replaced, whereas the 2nd Defendant considers that it has been validly appointed Trustee of the Trust.

25. I am also satisfied that there is a good arguable case that the claim falls within one or more classes of claim for which permission to serve out may be given. My reading of the Trust Deed is described at paragraph 17 above. The Trust Deed provides that the law of Gibraltar is the proper law of the Trust; that the courts of Gibraltar are the primary forum for proceedings relating to the Trust; and that the management and administration of the Trust shall be carried out by the Trustees in Gibraltar. Accordingly, it is clearly arguable that the claim falls within PD 6B 3.1 (12), (12A), and (12B).
26. Finally, in my view, Gibraltar is clearly or distinctly the most appropriate forum for the trial of the dispute, and in all the circumstances the court ought to exercise its discretion to permit service out. Although Clause 16 of the Trust Deed is a non-exclusive jurisdiction clause, it requires “*very strong*” reasons to be displaced (*UCP plc v Nectrus Ltd.* 2018 EWHC 380 (comm) per Cockerill J at [80]), and the provision also includes a choice of law clause designating the law of Gibraltar as the proper law of the Trust and designates Gibraltar as the place of the Trust’s management and administration. In addition, other relevant instruments (in particular the January 2024 Deed by which the 3rd Defendant purportedly retired as Protector and the Claimant was appointed in his place and the March 2024 Deed purporting to remove the 1st Defendant and to appoint the 2nd Defendant as Trustee of the Trust) and are governed by Gibraltar law and subject to the (non-exclusive) jurisdiction of the courts of Gibraltar. It also appears to be agreed by all parties that the attempt in 2023 to transfer the administration of the Trust to Guernsey was ineffective, as all are agreed that at that time the Claimant had not been appointed Protector.

27. In exercise of the Claimant's duty of full and frank disclosure, I was informed the 4th Defendant has threatened to bring proceedings in Guernsey (see para. 82 of the Claimant's witness statement). The 1st and 2nd Defendants are also, of course, Guernsey entities, and the 3rd Defendant a Guernsey resident. As mentioned in paragraph 1 above, as yet only the 3rd Defendant has given any indication of accepting the jurisdiction of this Court. There is also a reference to other legal proceedings in the Claimant's witness statement (at para. 87) but I am told that these do not involve this Trust. Finally, the 4th Defendant has raised various allegations of misconduct by the Claimant and the 2nd Defendant (para. 88 of the Claimant's witness statement). I do not, however, think these relevant to the issues of construction which this Court is asked to decide. Nor do I think that any of the other circumstances drawn to my attention detract from Gibraltar being clearly or distinctly the most appropriate forum for the trial of this dispute. They are far outweighed by the terms of the Trust Deed on jurisdiction, proper law and place of administration. Taking account of all the circumstances, I conclude that were it necessary for me to do so, I would exercise my discretion to permit service out.

Conclusions

28. It therefore does not appear appropriate to make an order in the form of the draft provided by the Claimant because I have concluded that permission from the court is not required for the Defendants to be served out of the jurisdiction. I instead make a declaration that permission is not required for service out of this claim.
29. The Claimant's Application Notice also included an application for a privacy order. I was asked to adjourn this application to a date to be fixed on application by the Claimant or any of the parties following service of the claim. I do so, but pending its determination make an order anonymising the names of the Claimant, the 3rd and 4th Defendants and the Trust. Otherwise, the application would be otiose.

30. Costs are reserved.

Matthew Happold

Puisne Judge

Date: 26 September 2024